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Dekon Sdn Bhd v Pembinaan Asas Klasik

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
K-02-(NCVC)(W)-1340–08 OF 2014
LIM YEE LAN, DAVID WONG AND IDRUS HARUN JJCA
3 JULY 2017

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Contract — Building contract — Claim for work done — Claim for final balance sum under sub-subcontract — Whether final total value of works carried out by respondent under sub-subcontract must be jointly inspected and measured at completion of works before final contract sum could be paid

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The appellant appealed against the decision of the High Court which allowed the respondent's claim for outstanding final sum due for works carried out under four sub-subcontracts and dismissed the appellant's counterclaim against the respondent. The appellant was the subcontractor of MMC-Gamuda Joint Venture Sdn Bhd. The respondent was appointed by the appellant as the sub-subcontractor to carry out works relating to the 'Electrified Double-Track Project from Ipoh to Padang Besar' ('the project'). Out of the total final contract sum, the appellant had only paid the respondent a sum of RM1,083,922.35 under various progress claims leaving a balance sum of RM258,955.58 ('the final balance sum'). The crux of the case lay on the final balance sum which was claimed by the respondent. The issue for consideration by the court was whether the final total value of works carried out by the respondent under the sub-subcontracts must be jointly inspected and measured at the completion of the works before the final contract sum could be paid.

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Held, allowing the appeal in part, setting aside order of the High Court and dismissing the appeal on counterclaim:

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(1) Waiver had no application to this case because all previous payments were for progress or interim claims but the dispute in this case was related to the final claim after the sub-subcontracts were mutually terminated and cl 7 required such claims to be finally inspected and measured on site to determine the total final contract sum (see para 36).

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(2) The court found considerable merits in the submission of the appellant that the respondent had not adduced any cogent evidence to prove the actual value of the works it had allegedly carried out other than the unilateral calculation had submitted. SP1 admitted during the trial that the respondent premised its claim for the final balance sum based purely on its own calculation (see para 37).

- (3) The respondents claim was pre-mature and the respondent ought to have requested for a final site inspection with the quantity surveyor or representative of the appellant to take measurement and to finalise the sum payable to the respondent after the mutual termination of the sub-subcontracts (see para 40).
- (4) The learned trial judge had misdirected himself by way of non-direction when he failed to construe the objective intention of the parties regarding payment terms by reference to the sub-subcontracts and he further erred in basing his finding purely on the course of conduct of the parties regarding previous payments which were for progress and interim claims. Such misdirection and erroneous finding rendered the learned trial judge's finding plainly wrong and warranted appellate intervention to set it aside (see para 41).

[Bahasa Malaysia summary]

Perayu telah merayu terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan responden untuk baki jumlah terakhir untuk kerja-kerja yang dijalankan di bawah sub-subkontrak dan menolak tuntutan balas perayu terhadap responden. Perayu adalah sub-kontraktor MMC-Gamuda Joint Venture Sdn Bhd. Responden telah melantik oleh perayu sebagai sub-subkontraktor untuk menjalankan kerja-kerja berkaitan 'Electrified Double-Track Project from Ipoh to Padang Besar' ('projek tersebut'). Daripada keseluruhan jumlah kontrak terakhir itu, perayu telah hanya membayar responden sejumlah RM1,083,922.35 di bawah pelbagai tuntutan pelaksanaan meninggalkan jumlah baki RM258,955.58 ('jumlah baki terakhir'). Intipati kes ini terletak pada jumlah baki terakhir yang dituntut oleh responden. Isu untuk dipertimbangkan oleh mahkamah adalah sama ada nilai keseluruhan terakhir kerja-kerja yang dijalankan oleh responden di bawah sub-subkontrak perlu diperiksa bersama dan diukur setelah kerja-kerja siap sebelum jumlah kontrak terakhir boleh dibayar.

Diputuskan, membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi dan menolak rayuan berhubung tuntutan balas:

- (1) Penepian tidak terpakai kepada kes ini kerana semua bayaran terdahulu adalah untuk tuntutan pelaksanaan atau interim tetapi pertikaian dalam kes ini adalah berkaitan tuntutan terakhir setelah sub-subkontrak telah bersama-sama ditamatkan dan fasal 7 mengkehendaki tuntutan-tuntutan tersebut diperiksa akhirnya dan diukur di tapak untuk menentukan jumlah kontrak terakhir secara keseluruhan (lihat perenggan 36).
- (2) Mahkamah mendapati terdapat merit yang kukuh dalam hujah perayu bahawa responden tidak mengemukakan apa-apa keterangan yang meyakinkan untuk membuktikan nilai sebenar kerja-kerja yang

- A dikatakannya telah dijalankan selain daripada pengiraan unilateral yang telah dikemukakan. SP1 mengakui sepanjang masa perbicaraan bahawa responden mempremisakan tuntutanannya untuk jumlah baki terakhir berasaskan semata-matas atas pengiraannya sendiri (lihat perenggan 37).
- B (3) Tuntutan responden adalah pramatang dan responden patut memohon untuk pemeriksaan tapak terakhir dengan juruukur bahan atau wakil perayu untuk mengambil ukuran dan untuk memuktamadkan jumlah yang kena dibayar kepada responden selepas penamatan bersama-sama sub-subkontrak tersebut (lihat perenggan 40).
- C (4) Hakim perbicaraan yang bjaksana telah salah arah dirinya kerana tiada arahan apabila belia gagal mentafsir niat objektif pihak-pihak berkenaan bayaran terma-terma rujukan kepada sub-subkontrak dan beliau selanjutnya terkhilaf berdasarkan dapatan beliau semata-mata atas kelakuan pihak-pihak berkenaan bayaran terdahulu yang merupakan tuntutan-tuntutan pelaksanaan dan interim. Arahan dan dapatan yang terkhilaf tersebut menyebabkan dapatan hakim perbicaraan yang bijaksana jelas salah dan mewajaran campur tangan pihak rayuan untuk mengetepikannya (lihat perenggan 41).]
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E **Notes**

For cases on claim for work done, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3925–3943.

Cases referred to

- F *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, FC (refd)
Jetara Sdn Bhd v Maju Holdings Sdn Bhd [2007] 3 MLJ 609; [2007] 3 CLJ 41, CA (distd)
- G *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, SC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Appeal from: Civil Suit No 22NCVC-257–10 of 2012 (High Court, Alor Setar)

- H *RS Maniam (PS Chuah with him) (Chuah, Halim & Co) for the appellant.*
Faiz Fadzil (Suriya Putra with him) (Taulan Rasul & Co) for the respondent.

Lim Yee Lan JCA:

- I INTRODUCTION

[1] This appeal by the appellant/first defendant is against the decision of the Alor Setar High Court dated 27 November 2014 in allowing the

respondent/plaintiff's claim for outstanding final sum due for works carried out under four sub-subcontracts and in dismissing the appellant/first defendant's counterclaim against the respondent/plaintiff.

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[2] For ease of reference parties will be referred to as they were in the High Court.

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BRIEF FACTS

[3] The first defendant was the subcontractor to MMC-Gamuda Joint Venture Sdn Bhd ('MMC-Gamuda') which was the main contractor in a project known as the 'Electrified Double — Track Project From Ipoh to Padang Besar' ('project') undertaken by MMC-Gamuda for and on behalf of KTMB as the client.

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[4] The first defendant in turn appointed the plaintiff as the sub-subcontractor under four contracts to carry out the following works in connection with the project:

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- (a) contract for 'river protection works/bank protection works' in the sum of RM26,418,000;
- (b) general trade in the sum of RM806,027.33;
- (c) general trade in the sum of RM887,135.93; and
- (d) sanitary and plumbing works in the sum of RM247,105.72.

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[5] The plaintiff claimed that the total value of work carried out by the plaintiff under the four sub-subcontracts including variation works came up to RM1,342,877.93 ('total final contract sum').

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[6] Out of the total final contract sum the defendant had only paid the plaintiff a sum of RM1,083,922.35 under various progress claims, leaving a balance sum of RM258,955.58 as the final balance sum.

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[7] The plaintiff had made several requests to the defendant to settle the final balance sum but to no avail.

[8] The plaintiff then through its solicitor, Messrs AG Roseli & Paul, sent a notice of demand dated 19 August 2012 to the first defendant demanding for the final balance sum.

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[9] The first defendant did not respond to the notice of demand.

- A** [10] On 3 October 2012 the plaintiff filed a claim against the first to the fourth defendants at the Alor Setar High Court in which the plaintiff claimed for the sum of RM258,955.58 with interest at 8%pa from the date of the notice of demand until full realisation and costs.
- B** [11] The second and third defendants were sued in their capacity as directors of the first defendant while the fourth defendant in its capacity as the 100% holding company of the first defendant.
- C** [12] In its statement of claim, the plaintiff averred that the second and the third defendants as directors and the fourth defendant as the 100% holding company were directly involved in the management and decision makings in the first defendant and were therefore personally liable for the plaintiff's claim.
- D** [13] In their joint-defence the defendants denied the plaintiff's claim.
- [14] In the case of the second and third defendants, they denied owing any personal liability under the four sub-subcontracts because the first defendant as a company is a separate legal entity from the directors and they were not responsible for any company debt. The fourth defendant also denied liability on the ground that the first defendant and the fourth defendant are separate legal entities and fourth defendant was not a party to the sub-subcontracts and could not be held liable for the first defendant's debt.
- E**
- F** [15] The first defendant in its defence denied that the 'total final contract sum' was RM1,342,877.93 or the balance final sum due to the plaintiff was RM258,955.58 and the plaintiff was put to strict proof of its claim. The first defendant also averred that the total final contract sum under the sub-subcontracts was subject to prior certification and approval of the first defendant.
- G**
- [16] The first defendant also pleaded that it had vide a memo requested the plaintiff to attend a joint-inspection and measurement of the works on 7 June 2012 but the plaintiff and/or its representative failed to attend.
- H**
- [17] The first defendant also counterclaimed for the sum of RM284,764.33 as over-payment to the plaintiff. However, particulars or details of the alleged over-payment were not pleaded, except that they would be adduced during the trial.
- I**
- [18] In its defence to the counterclaim, the plaintiff denied the first defendant's allegation of over-payment and put the first defendant to strict proof of its claim and further prayed for the counterclaim to be dismissed.

[19] The plaintiff's claim and first defendant's counterclaim went on for full trial during which Mr Leong Siew Kong, the sole proprietor of the plaintiff, testified on behalf of the plaintiff as SP1, while the first defendant called two witnesses, Encik Mohamad Jamili bin Ahmad Jamil, its contract administrator as SD1 and Mr Koh Tak Chun, its assistant general manager as SD2.

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HIGH COURT DECISION

[20] At the conclusion of the trial the learned trial judge: (1) dismissed the plaintiff's claim against the second to the fourth defendants; (2) allowed the plaintiff's claim for the sum of RM258,955.58 against the first defendant with costs of RM6,000; and (3) dismissed the first defendant's counter claim against the plaintiff.

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[21] Briefly, the learned High Court judge's decision was premised on the following findings:

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- (a) the first defendant's defence that the final balance sum required the approval or certification of the first defendant after a joint-inspection and measurement was an afterthought;
- (b) the evidence adduced before the court showed that previous payments to the plaintiff were made without any certification or approval from the first defendant's quantity surveyor or site supervisor. In view of the past practice or course of conduct of the parties, it was too late in the day for the first defendant to insist that any payment under the sub-subcontracts required joint-inspection and measurement between the parties or the issuance of any final account by the first defendant. The court would apply the decision in the case of *Jetara Sdn Bhd v Maju Holdings Sdn Bhd* [2007] 3 MLJ 609; [2007] 3 CLJ 41, where the facts fall on all fours with the facts in this case, in which the Court of Appeal held that the defendant's excuse that it could not pay the final payment because the JKR had not issued the final certificate was an unacceptable excuse;
- (c) the court also agreed with the plaintiff that there was no proof of service of any memo from the first defendant to the plaintiff regarding the joint-inspection of the works to be carried out on 7 June 2012, as alleged by SD1 and SD2. The court believed SP1 who testified that the plaintiff had never received the memo as alleged by the first defendant. The memo was therefore an afterthought;
- (d) on the other hand, the plaintiff had shown that it had through its letter dated 20 May 2012 to the first defendant complained about the site management and the overdue progress payments. The plaintiff had also via a letter dated 16 November 2012 expressed its intention to terminate the sub-subcontracts;

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- A** (e) compared to the first defendant who although claimed that it had sent a letter dated 5 June 2102 to the plaintiff to express its dissatisfaction with the plaintiff's works, yet never bothered to terminate the sub-subcontracts;
- B** (f) the court agreed with the plaintiff that SD1 was not a credible or competent witness to testify on behalf of the first defendant as he had no knowledge whatsoever of the arrangement between the plaintiff and the first defendant and was not even aware how much the first defendant had paid the plaintiff under the sub-subcontracts;
- C** (g) for the above reasons, the court held that the plaintiff had proven its claim against the first defendant for the sum RM 258,955.58. In consequence, judgment was entered in favour of plaintiff for the said sum with interests at 5% from the date of the notice of demand until full realisation and costs of RM6,000;
- D**
- E** (h) with regard to the first defendant's counterclaim for over-payment of the sum of RM 284,764.23, SD1 and SD2 in their testimonies claimed that it relates to payments made by the first defendant to suppliers of construction/building materials on behalf of the plaintiff and rentals of machinery to assist the plaintiff in expediting the works. The court found that these particulars were never pleaded in its counterclaim and it is trite law that parties are bound by their pleadings (see: *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428);
- F** (i) in any case, no concrete evidence was adduced by SD1 and SD2 during the trial to prove these particulars which remained as bare assertions;
- (j) further, it was illogical for the first defendant to claim on the one hand that it had overpaid the plaintiff the sum of RM284,764.23 and on the other hand claimed that the total final contract sum has yet to be finalised;
- G**
- (k) in conclusion, based on the foregoing findings, the court allowed the plaintiff's claim and dismissed the first defendant's counterclaim with costs; and
- H** (l) as regards the second to the fourth defendants, the court found that there was no legal or contractual basis for the plaintiff's claim against them and hence the plaintiff's claim was dismissed.

DECISION OF THIS COURT

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[22] At the conclusion of hearing the appeal, after having taken into consideration the oral and written submissions of learned counsels and perused the record of appeal, we allowed the appeal in part and set aside the order of the High Court in allowing the plaintiff's claim. As for the counterclaim learned

counsel for the first defendant had rightly conceded during the hearing before us that particulars of over-payment constituting the counterclaim had not been specifically pleaded as held by the learned trial judge. In the light of such concession, we therefore dismissed the appeal on the counterclaim. As the appeal was allowed only in part we ordered each party to pay its own costs but deposit was ordered to be refunded.

[23] The plaintiff has applied for leave to appeal to the Federal Court against our decision. We set out the reasons for our decision in allowing the appeal.

REASONS FOR OUR DECISION

[24] It is clear from learned counsels' submission that the appeal before us was premised on a very narrow issue, i.e. whether the final total value of works carried out by the plaintiff under the sub-subcontracts must be jointly-inspected and measured at the completion of the works before the final contract sum could be paid. Learned counsel for the first defendant argued that the answer is in the affirmative as provided in cl 7 of the sub-subcontracts while learned counsel for the plaintiff contended otherwise, relying in the main on the past practice and course of conduct of the parties in respect of previous payments where no such join-inspection or prior certification from the first defendant was required as rightly held by the learned trial judge.

[25] Now it is trite law that construction of contract is a matter of law and whatever may be the understanding of the parties with regard to their subjective intention, it is for the court to determine their objective intention based on the terms and conditions in the contract after taking into account the surrounding background facts and circumstances (see: *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597).

[26] It was therefore pertinent for this court (so should the learned trial judge), to examine the terms and conditions in the sub-subcontracts to determine what were the payment terms for the works as agreed to by the parties, if any.

[27] Having perused the four sub-subcontracts, all of which contained the similar terms and conditions, we were of the opinion that there were two pertinent clauses which governed the contract sum and payment terms for the works. These two clauses were cll 2 and 7 respectively and they read as follows:

2. SUB-SUB-CONTRACT

The total sub-sub-contract sum is Ringgit Malaysia: Two Hundred Fourty Seven Thousand One Hundred Five and Cent Seventy Two Only [RM 247,105.72] as per

- A** attached appendix A Bills of Quantities/Schedule of Prices.
- The sub-sub-contract is inclusive of all preliminaries expenses and/or any other expenses required for the proper execution and completion of the Works as further stated in Clause 3.
- B** All inconsistencies and/or unreasonable rates and unit rates shall have to be rationalized and adjusted to DK's satisfaction without any change to the agreed Sub-sub-contract sum before the signing of the sub-sub- contract agreement.
- For the purpose of valuation of the variation /additional works, the agreed rationalized rates in the bills of Quantities and Schedule of Rates (whichever is applicable) shall determine the valuation as if such rates are not applicable, then at a rate/price as approved by DK.
- C**
- All rates/price shall be firm for the construction and completion of the whole of the Works and is not subject to adjustment in respect[y1] of fluctuations in cost of wages and/or expenses of any kind payable to work people and/or from fluctuations in costs of materials and goods, import duty or any other taxes etc.
- D**
7. PROGRESS PAYMENT AND RETENTION SUM
- Period of Progress Claim: (2) Twice a month (claim to be submitted on/or before 10th day of each month or at specific dated directed by DK)
- E**
- Period of Honouring: 15 days from the date of receipt of progress payment certificate from DK.
- Retention Sum: 5% of gross amount certified limited to a maximum of 5% of sub-contract sum.
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- Failure on the part of the Sub-Sub-Contractor to submit progress payment claims to DK may render the work done not being valued and certified by DK and payment not being made to the Sub-Sub-Contractor.
- The release or progress payment prior to the Certificate of Practical Completion (CPC) is subject to final site inspection and acceptance of Works by the SO/Architect and client; and all NCR issued are closed.
- G**
- One moiety of the retention sum shall be released forty-five (45) days from the date of DK receiving payment for the released of 1 (One) moiety of the retention under the main contract, the second moiety of the retention sum shall be released forty-five (45) days from the date DK receiving the payment for the release of 2nd moiety of the retention sum under the main contract.
- H**
- No payment shall be made to the Sub-Sub-Contractor if the original copy of this Sub-Sub-Contractor Agreement is not duly signed, endorsed and returned to DK.
- I** [28] Reading cll 2 and 7 together, especially the highlighted portions, it is clear that while the sub-subcontracts were described as fixed sum contracts, and the contract sum stated in each sub-subcontract was calculated and arrived at in accordance with the bills of quantities attached to each contract, they nevertheless provide for the taking of accounts at the completion of the works

after final inspection and measurement. In other words, the final value of work done, taking into account omissions and or variation/additional works, would be subject to final inspection and measurement at the completion of the contracts.

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[29] During the trial, both SP1 and SD1 agreed that the four sub-subcontracts were mutually terminated on 5 June 2012. It is our considered opinion that having regard to cl 7, which required works done to be finally inspected and measured at the completion of the contracts, all the more so in a situation where the contracts were mutually terminated before completion.

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[30] Throughout his testimony, SP1, sole proprietorship of the plaintiff, agreed that the *total value of work done* in the sum of RM1,342,877.93 as claimed by the plaintiff was the plaintiff's own calculation and there was no prior certification or approval by the first defendant's quantity surveyor or site supervisor or based on any joint-inspection. However, SP1 insisted that such approval or certification was not necessary because the first defendant had never required any joint-inspection or its prior certification or approval when making previous payments of RM1,083,922.35. SD1, on the other hand, had explained to the court that those previous payments were for progress and interim claims but for the final claim joint-inspection and measurement of the final value of work done would have to be carried out.

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[31] It is rather unfortunate that the learned trial judge in his grounds of judgment, instead of determining the dispute by reference to the contractual terms, simply went on to agree with SP1 and the plaintiff's counsel's submission that the first defendant was estopped from insisting on join-inspection and measurement because of the practice between parties and the first defendant's past conduct in making previous payments without such requirement.

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[32] The learned trial judge cited in support of his finding this court's decision in the case of *Jetara Sdn Bhd v Maju Holdings Sdn Bhd* [2007] 3 MLJ 609; [2007] 3 CLJ 41. However, having perused that case, we would agree with the first defendant's counsel that *Jetara Sdn Bhd v Maju Holdings Sdn Bhd* was decided based on its facts. The rationale for this court's decision in *Jetara Sdn Bhd* could be seen in the following holdings:

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... It was accepted that the amount stated in the Progress Payment Certificate No 12(d) was provisional and subject to final confirmation. *However, the parties had met several times to finalise the account after the issuance of that certificate. As such, there was no excuse for the respondent to say that payment could not be paid because the respondent had not issued its final account due to the fact that the JKR had not issued the said Certificate ...*

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- A (1) ... Furthermore, it would be unfair to the appellant for the respondent to insist that further payments to the appellant could only be made after the JKR had issued the said Certificate. It must be appreciated that the appellant's works under the contract with the respondent formed only a part of the works under the said project the respondent had with JKR. There could be other reasons that led to the
- B non-issuance of the said Certificate by the JKR, and the respondent had not disclosed the reason for the withholding of the said Certificate or whether any effort had been made to secure its issuance. ...
- ... As such there was no excuse for the respondents to say that payment could not be paid because the respondent had not issued its final account due to the fact that the
- C JKR had not issued the said certificate. ...

- [33] In the present case, there was no discussion between the parties on the final claim after the mutual termination of the contracts. SP1 agreed that the
- D *final value of work done* was arrived at *unilaterally* by the plaintiff itself. No doubt SP1 had testified that the plaintiff was forced to take such a step because the first defendant refused to pay outstanding sums despite various requests which led to deterioration in the relationship between the parties culminating in the alleged physical assault of SP1 and his brother by the first defendant's site
- E supervisors and workers and the filing of police reports by them. SP1 also claimed that the plaintiff had never received any memo for any joint-inspection of the works on 7 June 2012 as claimed by SD1 to which the learned trial judge accepted. Be that as it may, it is clear that cl 7 required final payment under the sub-subcontracts to be subject to final inspection and measurement.

- F [34] In fact, SP1 had agreed both during cross-examination and re-examination that in the past not all claims made by the plaintiff were paid in full by the first defendant and he also agreed that the plaintiff did not object or protest to the lesser payment each time payment was made. The implication
- G was that SP1 was aware that previous payments were for *progress* or *interim* claims and the final contract sum would be adjusted and measured, obviously upon a final site inspection of the works.

- [35] We therefore agreed with the first defendant's counsel that the learned
- H trial judge erred in law and in fact in basing his decision in this case primarily on the course of conduct of the parties in regard to previous payments made under the sub-subcontracts.

- [36] For the sake of discussion, even assuming that the learned trial judge
- I was of the implied view that the course of conduct of the parties operates as a waiver of the strict compliance with cl 7, we would nevertheless still be inclined to agree with the first defendant's counsel that waiver had no application to this case because as explained by SD1, and as impliedly admitted by SP1, all previous payments were for *progress* or *interim* claims but the dispute in this

case relates to the *final* claim after the sub-subcontracts were mutually terminated and cl 7 requires such claim to be finally inspected and measured on site to determine the total final contract sum.

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[37] Apart from that, we also found considerable merits in the submission of the first defendant's counsel that the plaintiff had not adduced any cogent evidence to prove, on a balance of probabilities, the actual value of the works it had allegedly carried out other than the unilateral calculation it had submitted. As stated earlier, SP1 had admitted during the trial that the plaintiff premised its claim for the sum of RM 258,955.58 based purely on its own calculation.

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[38] We also noted that the learned trial judge decided in the manner he did in this case because he found SP1's testimony to be more believable or credible than SD1 whom he found to be unreliable. He also found SD1 to be 'a one man show' who had no knowledge or clue whatsoever of the dealings between the plaintiff and the first defendant under the sub-subcontracts and therefore was not even competent to testify on behalf of the first defendant.

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[39] It has often been said that a trial judge who makes his findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence runs the risk of having his findings corrected on appeal (per Gopal Sri Ram CJA (as he then was) in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (CA)).

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[40] In all the circumstances of the case, in view of the payment terms in cll 2 and 7 of the sub-subcontracts, we were of the considered opinion that the plaintiff's claim was pre-mature. The plaintiff ought to have requested for a final site inspection with the first defendant's quantity surveyor or representative to take measurement and to finalise the final sum payable to the plaintiff after the mutual termination of the sub-subcontracts.

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[41] In conclusion, based on the foregoing discussion and analysis, we were of the considered opinion that the learned trial judge misdirected himself by way of non-direction when he failed to construe the objective intention of the parties with regard to payment terms by reference to the sub-subcontracts and he further erred in basing his finding purely on the course of conduct of the parties in regard to previous payments which, as discussed earlier, were for progress and interim claims. Such misdirection and erroneous finding rendered the learned trial judge's finding plainly wrong and warranted appellate intervention to set it aside.

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A DECISION AND ORDER

[42] For the reasons stated above, we allowed the appeal and set aside the order of the High Court in allowing the plaintiff's claim. We however dismissed the appeal on the counterclaim as it has been abandoned during the appeal. The order of the High Court was thus varied to the extent stated above. In view that the appeal was allowed only in part, we also ordered each party to bear its own costs of the appeal, but deposit was ordered to be refunded.

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C *Appeal allowed in part; High Court's order set aside; appeal on counterclaim dismissed.*

Reported by Fatin Mohd Ismail

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